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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 77-753**

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF AMERICA,

*Petitioner,*

v.

JOHN DANIEL,

*Respondent.*

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**No. 77-754**

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LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF  
AMERICA, AND LOUIS F. PEICK,

*Petitioners,*

v.

JOHN DANIEL,

*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit**

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**MOTION OF AMERICAN BANKERS ASSOCIATION  
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE  
AND BRIEF IN SUPPORT OF PETITIONERS**

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*Of Counsel:*

D. BRET CARLSON

PAUL E. KONNEY

STEPHEN R. KROLL

ROGER P. JOSEPH

DEBEVOISE, PLIMPTON, LYONS & GATES

299 Park Avenue

New York, New York 10017

WILLIAM H. SMITH

*General Counsel*

American Bankers Association

1120 Connecticut Avenue, N.W.

Washington, D.C. 20036

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**MOTION OF AMERICAN BANKERS ASSOCIATION  
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To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:

The American Bankers Association respectfully  
moves, pursuant to Rule 42 of the Rules of this Court, for

leave to file the attached brief as *amicus curiae* in support of the petitioners, urging reversal of the decision by the United States Court of Appeals for the Seventh Circuit. The Association has sought the consents of the parties to the filing of this brief; the petitioners have granted their consent, but the respondent has not.

The decision below held for the first time that for purposes of the antifraud provisions of the federal securities laws, an employee's right to receive retirement benefits from a pension plan to which he does not contribute is a "security" which the employee "purchases" through becoming and remaining employed.

#### Interest of the American Bankers Association

The American Bankers Association consists of approximately 13,500 banks and trust companies, or 93% of the commercial banks in the United States. Banks in the Association hold or manage the assets of more than 120,000 employee benefit plans, aggregating nearly \$90 billion. Association members also maintain employee benefit plans for their own one million employees.

The parties typically involved in a pension plan are (1) the employees covered by the plan, who may be represented by a union; (2) their employer; (3) the individuals who administer the plan; and (4) the institution that holds and manages the plan's assets. No bank or other professional fiduciary is a party to this action, although banks manage most of the assets of the Local 705 Pension Trust fund involved here,<sup>1</sup> and banks

<sup>1</sup> Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, Exhibit 1, 183a (the suffix "a" denotes a page in the Appendix filed in this Court); see *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1240 n.35 (7th Cir. 1977), cert. granted, 98 S.Ct. 1232 (1978) [hereinafter cited as *Daniel*].

in general manage over 65% of all private noninsured pension funds in the United States.<sup>2</sup>

Plaintiff is a retired employee with a particular grievance about his pension. Defendants are the employee's union, in its capacity as plan sponsor, and the labor-management Board of Trustees that administers the plan.<sup>3</sup> The general views of employers and unions were presented in the Court of Appeals by two *amici curiae*, the ERISA Regulations Industry Committee and the National Coordinating Committee for Multiemployer Plans. In addition, two regulatory agencies, the Department of Labor and the Securities and Exchange Commission, presented their (conflicting) positions. But neither the parties to this action nor the *amici curiae* below have presented or adequately could present the views of the fiduciaries of the nation's pension funds on the momentous issues they confront because of the decision below.

The American Bankers Association is uniquely situated to assist this Court in reviewing the decision of the Court of Appeals. The large number of professional fiduciaries among the Association's members are seriously affected by the decision below. They are expert in the financial and administrative aspects of pension fund management and are intimately acquainted with the problems

<sup>2</sup> 1975 Survey of Private Noninsured Pension Funds, 35 SEC Statistical Bulletin 552, 553 (Nov. 1976).

<sup>3</sup> The Local 705 Pension Trust Fund is administered by a Board of Trustees composed equally of union and employer representatives, pursuant to section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1970). These individuals should be distinguished from the professional bank trustees that manage approximately \$54 million of the \$97 million of assets held in trust for the Local 705 pension plan. Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, Exhibit 1, 183a; see *Daniel* at 1240 n.35.

presented by the extensive existing regulation of pension plans. The American Bankers Association participated in the congressional hearings and other deliberations that led to enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Association is also conversant with earlier legislation relating to pension plans, including the 1970 amendment to section 3(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(2) (1976), which was unduly accorded critical importance by the Court of Appeals.

The attached brief on the merits is limited to the following arguments:

— Nothing in the legislative or administrative history of the securities laws supports the application of those laws to interests in pension plans.

— Extension of the securities laws to pension plans is contrary to the public interest and is unnecessary in view of the comprehensive regulatory system already in effect under ERISA.

— The retired employee in the present case, and others similarly situated, can obtain full redress under well established principles of law, without resort to the securities laws.

The American Bankers Association seeks leave to present these considerations, which will not otherwise be presented from the perspective of the fiduciaries that manage pension funds.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae*, urging reversal of the decision of the Court of Appeals.

Dated: May 22, 1978

Respectfully submitted,

WILLIAM H. SMITH  
*General Counsel*

American Bankers Association  
1120 Connecticut Avenue, N.W.  
Washington, D.C. 20036

*Of Counsel:*

D. BRET CARLSON  
PAUL E. KONNEY  
STEPHEN R. KROLL  
ROGER P. JOSEPH

DEBEVOISE, PLIMPTON, LYONS & GATES  
299 Park Avenue  
New York, New York 10017

**BRIEF OF AMERICAN BANKERS ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS**

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**INTEREST OF THE AMERICAN BANKERS  
ASSOCIATION**

Application of the securities laws to pension plans would have a serious negative effect upon the continuation and expansion of the private pension system of the United States. That prospect is of great concern to the American

Bankers Association, whose members—comprising about 93% of the commercial banks in the United States—have responsibility for holding or managing the assets of over 120,000 employee benefit plans, aggregating nearly \$90 billion. As professional fiduciaries, these banks are well situated to gauge the impact an additional layer of governmental regulation would have on the already highly regulated field of pension plans. The Association believes the extension of the securities laws to pension plans not only is wrong as a matter of law and policy but also is not necessary for the protection of individual employees against fraudulent or improper conduct by pension plan administrators.

Accordingly, the Association submits this brief in support of the petitioners and urges the Court to reverse the decision of the Court of Appeals.

#### SUMMARY OF ARGUMENT

We shall not reiterate the argument, adequately made in other briefs, that the term “investment contract,” as used in the statutory definition of “security,” cannot reasonably be read to include noncontributory pension plans. We shall, however, show that the history of the securities laws does not support that reading, that affirmation of the decision below would not be in the interest of employees generally or of the country’s private pension system and, equally important, that this Court need not extend the regulation of the securities laws to pension plans in order to afford relief to the plaintiff. Although his is undeniably a hard case, he and any other employees with similar grievances can find full relief through other causes of action asserted in his complaint.

The question before the Court is whether the “anti-fraud” provisions of the securities laws<sup>1</sup> should be extend-

<sup>1</sup> Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1976); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976). These statutes will be referred to as the “1933 Act” and the “1934 Act”, respectively.

ed to give a right of action to a member of a noncontributory pension plan who alleges that the forfeiture provisions of the plan have been unfairly applied and that those responsible for administering the plan have misled him about his potential benefits. To reach an affirmative answer to that question it is first necessary to decide that an employee’s right to receive retirement benefits under a pension plan is a “security” which the employee “purchases” through becoming and remaining employed, even though he himself makes no contributions to, and is automatically covered by, the plan. The securities laws themselves contain no hint that this is so, and all agree that Congress never considered pension plans in enacting those laws.

Consequently, the issue is whether this Court should nevertheless decide that the statutory definition of “security” should be read to include an interest in a noncontributory pension plan and the statutory word “sale” should be read to include the process by which an employee earns the right to a pension.

In the absence of clear congressional intent, regulatory statutes should not be expanded to cover additional areas of conduct unless public policy strongly requires such expansion. Here the policy considerations are to the contrary. Regulation of pension plans under the securities laws would not be in the interest of either employees or employers; it would accelerate a recent trend toward abandonment of plans and curtailment of benefits and would further discourage the establishment of new plans, especially by small companies.

Moreover, Congress has specifically acted through the Employee Retirement Income Security Act of 1974 (“ERISA”)<sup>2</sup> to bring pension plans under the most

<sup>2</sup> 29 U.S.C. §§ 1001-1381 (Supp. V 1975).

comprehensive regulation. To superimpose the regulation of the securities laws would not fill a gap in the congressional regulatory scheme but would run counter to its basic purposes. If ERISA had been in effect at the time of the plaintiff's retirement, his loss of a pension could not have occurred, and the "fraudulent" administrative conduct he complains of would have been actionable even without proof of any personal loss.

What remains, therefore, is only the question whether it is necessary to extend the regulation of the securities laws to pension plans generally in order to afford redress to individual employees who, like the plaintiff, have grievances antedating ERISA. The answer is clear: for the kind of arbitrary forfeiture provisions and misleading statements complained of by the plaintiff, the courts have developed fully adequate remedies without resort to the securities laws. Indeed, these remedies have been invoked by the plaintiff in his complaint, have survived a motion to dismiss and would give the plaintiff, if his evidence supports his pleadings, precisely the relief he seeks without needless extension of the securities laws to his case.

## ARGUMENT

### I.

**The history of the securities laws does not support the application of those laws to noncontributory pension plans.**

The language of the securities laws gives no direct indication that they cover pension plans. Moreover, as the Court of Appeals acknowledged, "The legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans."<sup>3</sup> However, the Court said it

<sup>3</sup> *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1237 (7th Cir. 1977) (footnotes omitted), *cert. granted*, 98 S.Ct. 1232 (1978) [hereinafter cited as *Daniel*].

found "a measure of guidance" in "subsequent legislative action and accompanying SEC interpretation."<sup>4</sup>

Actually, the "subsequent legislative action" on the 1933 Act demonstrates clearly that Congress never considered whether an employee's right to benefits under a noncontributory pension plan was a security. As for the "accompanying SEC interpretation", the record shows that the Commission has consistently indicated that noncontributory pension plans were outside the scope of the securities laws.

### A. Legislative action and administrative interpretation of the securities laws, 1933-1970.

In seeking "guidance" from "subsequent legislative action", the Court of Appeals referred first to the 1934 rejection by a House-Senate Conference Committee of a proposal to add to the 1933 Act an exemption from registration for any "offering made solely to employees of an issuer or of its affiliates in connection with a bona fide plan for the payment of extra compensation or stock investment plan for the exclusive benefit of such employees."<sup>5</sup> The Court quoted the conferees as explaining they had deleted the proposed exemption "in order to protect participants in such plans who 'may be in as great need of protection afforded by availability of information concerning the issuer for which they work as are most other members of the public.'"<sup>6</sup>

From this action of the conferees, and this extract from their statement, the Court, without further explanation, evidently drew an inference that interests in all

<sup>4</sup> *Daniel* at 1237 (footnotes omitted).

<sup>5</sup> *Daniel* at 1237 (emphasis omitted), *quoting* 78 Cong. Rec. 8708 (1934).

<sup>6</sup> *Daniel* at 1237-38, *quoting* H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).

employee benefit plans were subject to the 1933 Act absent a specific exemption. Such an inference is clearly not justified. The very passage relied on by the Court of Appeals demonstrates this when read in full: "The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in *employees' stock-investment plans* may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) (emphasis supplied). The conferees' refusal to exempt an offering to employees of an issuer under an employees' stock-investment plan hardly suggests that a security offering would be involved in maintaining a noncontributory pension plan. The proposed exemption plainly was intended for an entirely different kind of arrangement: a "stock-investment plan" under which participating employees would make cash contributions for investment in stock of their employer. *Id.*

The next "guidance" found by the Court of Appeals to show that pension plans were within the scope of the securities laws was some 1941 testimony by SEC Commissioner Purcell on a proposal that the Commission be given power to exempt certain "employee plans" from the registration requirements of the 1933 Act.<sup>7</sup> In fact, however, the thrust of Purcell's testimony was in the opposite direction. While he did observe that an interest in an "employee plan" might be a security, his full testimony made clear that he was talking about a contributory plan, in which money was freely invested by employees. See *Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of*

<sup>7</sup> *Daniel* at 1238.

1934 Before the House Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 888-92, 895-96, 902-04, 909-10 (1941) (statement of Ganson Purcell). The question whether an employee's interest in a noncontributory pension plan might be a security simply did not arise because, as Purcell was at pains to emphasize, inclusion of employees in such a plan would not involve a "sale" in any event. *Id.* at 896-97.

The Court of Appeals then referred to what it said was the opinion of an Assistant General Counsel of the SEC in 1941 that the term "security" within the definition of the 1933 Act included employee pension plans.<sup>8</sup> However, the opinion letters the Court cited did not intimate, let alone conclude, that an interest in a noncontributory plan was a security. In the first of two letters to the same correspondent, the Assistant General Counsel said: "The Commission has always taken the position that the offer or sale of interests in *certain types of voluntary, contributory plans* is subject to the registration and prospectus requirements of the Securities Act of 1933. . . ."<sup>9</sup> In the second letter, obviously written in response to an inquiry from the correspondent as to why an interest in those types of plans should be viewed as a security, the Assistant General Counsel said: "You are correct in surmising it to be our position that the security which is involved within the meaning of Section 2(1) of [the 1933] Act in connection with the offer or sale of interests in certain types of plans [*i.e.*, voluntary, contributory plans] is normally an 'investment contract.'" The second letter went on to say that no offer or sale was involved "in the case of a non-contributory plan".<sup>10</sup>

<sup>8</sup> *Daniel* at 1238 (footnote omitted).

<sup>9</sup> [1941-44 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 75,195 at 75,386 (1941) (emphasis supplied).

<sup>10</sup> *Id.* at 75,387.

These early events in the history of the 1933 Act obviously did not support the view that noncontributory pension plans were within the scope of the securities laws. The Court of Appeals therefore sought to buttress its conclusion by reference to what it saw as the implication of an amendment to the 1933 Act in 1970. That amendment carried no such implication.

#### B. The 1970 amendment to the 1933 Act.

The Investment Company Amendments Act of 1970 amended section 3(a)(2) of the 1933 Act by exempting from registration

"any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with . . . a stock bonus, pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954. . . ."<sup>11</sup>

The Court of Appeals concluded that by the adoption of this exemption Congress recognized that "interests in employee pension funds are 'securities' ".<sup>12</sup> However, the background of the 1970 amendment shows such a conclusion to be unjustified. We say this with some assurance because the American Bankers Association was closely involved in the development of that amendment.

The 1970 amendments to section 3(a)(2) of the 1933 Act and to corresponding provisions of the 1934 Act were the result of a seven-year effort by banks and their regulators and the Securities and Exchange Commission to clarify the status under the securities laws of various kinds of commingled investment funds maintained by bank trust

<sup>11</sup> Pub. L. No. 91-547, § 27(b), 84 Stat. 1434 (1970).

<sup>12</sup> *Daniel* at 1239.

departments for their customers.<sup>13</sup> The status of pension plans as such was not involved. The focus was rather on whether the Commission should regulate the potential proliferation of bank common trust funds into new, more investor-oriented fields.

The common trust fund was developed by banks to bring the efficiencies and other advantages of scale to the management of trust funds. Under traditional fiduciary principles, a trustee was required to hold the trust assets separate and apart from his own funds and those of others. With the emergence of bank trust departments as professional trustees, however, it became common for a single department to serve as trustee of hundreds of trusts, and it was natural for banks to seek a way of combining funds for investment purposes. The common trust fund was a solution.<sup>14</sup> In its classic form (though there are variations), a common trust fund is created by a bank's execution of an instrument declaring that the bank will hold in a separate trust such money or property as it decides to transfer to itself, as common trust fund trustee, from trusts of which the bank is trustee. The entire arrangement is effected by the bank itself. Neither the grantors nor the beneficiaries of the participating trusts are required to act when assets are transferred into or out of the common trust fund.

To avoid violation of the fiduciary rule against commingling, banks at first obtained authority to use a common trust fund by including express provisions in the

<sup>13</sup> Certain "separate accounts" maintained by insurance companies also became involved because of their asserted similarity to the commingled funds maintained by banks.

<sup>14</sup> For a history of the development of common trust funds and their regulation, see Saxon & Miller, *Common Trust Funds*, 53 Geo. L.J. 994 (1965). Messrs. Saxon and Miller were Comptroller of the Currency and Deputy Comptroller of the Currency, respectively.

trust instruments of the participating trusts. Later, state statutes were enacted, authorizing banks to transfer assets to common trust funds even where the trust instruments were silent on the subject. In either case, common trust funds were subject to regulation under state laws or by the administrative rules of bank regulatory agencies, or both, to protect against possible abuses.<sup>15</sup>

By 1933 common trust funds were well known. However, they were not mentioned in either the 1933 Act or the 1934 Act,<sup>16</sup> and it was generally accepted that they were outside the scope of those Acts.

With the rapid expansion of pension and profit sharing plans after 1941, banks came to be the trustees under many such plans. They naturally turned to the common trust fund technique as a means of achieving efficient and profitable collective investment of funds coming into their hands in that capacity. As in the case of the earlier common trust funds, no questions were raised about the applicability of the securities laws to bank common trust funds for pension and profit sharing trusts.

During the early 1960's, however, extension of the common trust fund concept into new fields, where participation was offered directly to customers, brought the securities law status of common trust funds into question for the first time. The most significant development was the attempt of First National City Bank to establish commingled accounts for the collective investment of funds of individual bank clients for whom the Bank served

<sup>15</sup> See, e.g., N. Y. Bank. Law § 100-c (McKinney 1971 & Supp. 1977); Comptroller of the Currency Reg. 9, § 9.18, 12 C.F.R. § 9.18 (1977).

<sup>16</sup> Common trust funds maintained by banks were exempted from regulation as mutual funds by the Investment Company Act of 1940, § 3(c)(3), 15 U.S.C. § 80a-3(c)(3) (1976).

not as trustee but only as custodian and investment manager.<sup>17</sup> The Commission took the position that interests in such commingled "managing agency accounts" should be subject to its jurisdiction on the ground that such interests constituted securities issued directly to bank customers by the commingled account itself, as a separate entity.<sup>18</sup>

At the same time, the Commission was confronted with the potential public offering of interests in bank-sponsored commingled trusts for retirement plans of self-employed individuals (so-called "Keogh Plans"), which were initially authorized by the Internal Revenue Code in 1962. Here too the SEC viewed the commingled fund as issuing securities of its own directly to the individuals maintaining Keogh Plans.<sup>19</sup>

As the Commission sought to regulate these two new types of commingled funds, the banking community became concerned that such regulation, depending on its form, might call into question the status of the older common trust funds. Consequently, the nation's banks, led by the American Bankers Association, began in 1963 to seek legislation dealing with all commingled investment funds maintained by banks.<sup>20</sup>

<sup>17</sup> The history of that attempt is described in *Investment Company Institute v. Camp*, 401 U.S. 617, 619-23 (1971).

<sup>18</sup> See Hearing Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 1st Sess. 4, 16-18 (1963) (statement of William L. Cary); *In re First National City Bank (Commingled Investment Account)*, 42 S.E.C. 924, 926 n. 4 (1966).

<sup>19</sup> See Hearing Before a Subcomm. of the House Comm. on Government Operations, *supra* note 18, at 6-7.

<sup>20</sup> The reasons for bank concern about traditional common trust funds were outlined in a statement made by representatives of the banking industry:

"In light of the existing administrative relief granted this type of fund, it may appear to members of this committee that

After much debate and long consideration, Congress developed a proposal to amend the 1933 Act to remove any doubt about the freedom from registration of all interests in traditional bank common trust funds and in commingled trusts maintained by banks for the investment of pension plan assets, but to subject to registration participating interests in commingled managing agency accounts and collective trusts for Keogh Plans. The SEC was willing to support this proposal, since it conformed to the SEC's own position.

None of these developments could possibly be viewed as having any implications for the status of pension plans as such. The proposals dealt only with collective investment arrangements. Now, however, occurred an episode to which the Court of Appeals accorded critical importance. At the last minute, the word "single" was conjoined with the word "collective" in the description of the kinds of bank-maintained trust funds that were to be exempted if used for investment of funds of qualified pension and profit sharing plans. The general exemption was thus phrased as extending to "any interest or participation in a single or collective trust maintained by a bank" in connection with a qualified employee benefit plan.

As pointed out by the Court of Appeals, the word "single" was inserted as the result of a suggestion by the General Counsel of Sperry Rand Corporation, who was concerned about the possible negative implication of the

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explicit statutory provisions are not required. This probably would be so were it not for the fact that amendments to the securities laws are being proposed for other types of bank collective funds, and to leave the statute silent as to this particular type of fund might raise questions and ambiguities as to their future status under the securities laws."

Hearings on Amendment No. 438 to S. 1659 Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 1284 (1967) (statement of Robert D. Ferguson).

proposed exemption for "collective trusts". It does not follow, however, that anyone believed that noncontributory pension plans would have been subject to the 1933 Act in the absence of an express exemption. On the contrary, the final form of the exemptive language, including the word "single", was officially explained as codifying the "long established administrative practice of the Commission". H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970). As recounted above, the Commission's "long established administrative practice" had recognized that interests in commingled trusts should not be subject to registration and, except in the case of trusts providing for investment of employee contributions in employer securities, that interests in noncommingled pension trusts should also be free from registration. However, the express exemption for all "single" trusts did serve a purpose: it specifically rejected the suggestion the SEC had made from time to time (but had never applied in practice) that trusts under *contributory* pension and profit sharing plans might be issuers of securities registrable under the 1933 Act.<sup>21</sup> An express exemption for collective trusts only might have implied support for that suggestion. Concern over that possibility was doubtless what spurred Sperry Rand Corporation into action. Sperry Rand had particular reason for concern, for it had just adopted a *contributory* profit sharing plan for its employees, and had established (but of course had not registered) a bank trust under that plan.<sup>22</sup>

In the light of this record, the most that can be said of the 1970 amendments is this: (1) Congress accepted the position of the banks that the collective trust funds they had long maintained for the commingling of funds held as

<sup>21</sup> See pp. 6-7, *supra*.

<sup>22</sup> Sperry Rand Corporation, Notice of Annual Meeting and Proxy Statement 16 (1968); see U. S. Dep't of Labor Form D-1 of Sperry Rand Corporation, Item 12 (File No. 07-50-11, November 6, 1969).

trustees under trusts created by unrelated grantors—whether by individuals or testators or sponsors of pension plans—were not subject to registration under the securities laws; (2) Congress did not wish to extend this exemption to the newer forms of collective investment funds designed to offer participation directly to the public, such as commingled funds for managing agency accounts or Keogh Plans; and (3) Congress made clear that all trusts funds maintained by banks under pension plans, whether contributory or noncontributory, were not subject to registration.<sup>23</sup>

The history of the 1970 amendments thus contains nothing to warrant a conclusion that Congress regarded the rights of an employee under a noncontributory pension plan as a security.<sup>24</sup> The development of federal pension legislation culminating in ERISA confirms that in 1970 Congress had no such view.

<sup>23</sup> For simplicity, we have ignored in this enumeration trust funds maintained by banks under plans, usually profit sharing plans, that invest employee contributions in stock of the employer. The 1970 amendments did not exempt such trusts from registration.

<sup>24</sup> Since the decision of the Court of Appeals, the Securities and Exchange Commission has recognized that the 1970 amendment to the 1933 Act should not serve as the basis for extending the securities laws to noncontributory pension plans. In a letter to the Chairman of the Senate Committee on Human Resources, the Chairman of the SEC stated that a memorandum the AFL-CIO had submitted to the Committee "incorrectly asserts that the 1970 amendment 'is crucial to the Commission's entire position in Daniel.'" The letter explains, "This assertion ignores the fact that the major thrust of the Commission's argument, rather than being directed toward the 1970 amendment, is that an interest in a pension fund is an 'investment contract,' as that term has been defined in numerous Supreme Court decisions." Letter from Harold M. Williams to Harrison A. Williams, Jr., n.3, reprinted in [1978] Pens. Rep. (BNA) No. 175, at R-3 n.3 (February 13, 1978).

### C. The development of ERISA.

ERISA was developed over a period of 15 years as a scheme for comprehensive federal regulation of pension plans. Throughout that period, Congress was never given any reason to believe that the securities laws already required the dissemination of information about the terms of pension arrangements or created federal rights of action for plan participants in cases of inadequate disclosure.

From 1954 to 1957, the Senate Committee on Labor and Public Welfare held lengthy hearings to consider the need for legislation to cure instances of fraud, mismanagement and unfairness in the operation of pension funds. The Securities and Exchange Commission was actively involved in those hearings because it was being considered as the agency to administer the new legislation. The testimony on behalf of the Commission indicated repeatedly that it had little, if any, existing statutory authority to deal with pension plans.<sup>25</sup>

<sup>25</sup> The following exchanges indicate the position the Commission took:

"Senator Douglas. The whole theory of the Securities and Exchange Act is primarily that the investor in securities should be furnished with accurate information about what he is purchasing, isn't that true?"

"Mr. Woodside [Director, SEC Division of Corporation Finance]. That is right.

"Senator Douglas. So you carry the principle of disclosure into the purchase of securities. I wonder if there are any principles of disclosure which you think might be carried over from that field to the management of pension and welfare funds?"

"Mr. Woodside. Senator, I don't know that I am competent to talk about what should be done with pension or welfare funds, or what disclosures should be or might be required of them.

"Senator Allott. To bring this thing back into focus a little bit, to be sure we are eliciting material which is pertinent, isn't it a fact that generally speaking the Securities and Exchange Commission would come into this particular field only by accident, so

During the ensuing years (and despite the 1970 amendments to the securities laws), the Commission never indicated by regulatory actions or in testimony before Congress that the antifraud provisions afforded pension plan participants a federal cause of action or gave the Commission power, under the antifraud rules, to require disclosure of the terms, financial condition or actuarial basis of pension plans. Congress agreed. As late as 1972, a congressional committee studying existing federal regulation of pension plans concluded that "[p]ension and profit sharing plans are exempt from coverage under the Securities Act of 1933 . . . unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer."<sup>26</sup>

On this whole record, it must be concluded that neither statutory language, nor legislative history, nor subsequent legislative action, nor administrative inter-

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to speak, by virtue of the fact that, *for example, in some of these plans stock is offered?*

"Mr. Goodwin [Commissioner, Securities and Exchange Commission]. *That is right.*

"Senator Allott. It is really an accident you are in it at all since you have no primary concern in it as certain other departments might—for example, the Internal Revenue Service.

"Mr. Woodside. I think that is correct. As I understood it, what was really wanted of us was an explanation of how our disclosure provisions operate with respect to certain other areas, and also some discussion of the way in which our acts affect those situations where a security is offered in connection with the plan."

Hearings Before the Subcomm. on Welfare and Pension Funds of the Senate Comm. on Labor and Public Welfare, 84th Cong., 1st Sess. 945, 946-47 (1955) (emphasis supplied).

<sup>26</sup> Subcomm. on Labor of Sen. Comm. on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess. 96 (1972). See also H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 7 (1973) and S. Rep. No. 93-127, 93d Cong., 1st Sess. 11 (1973), which, in describing then-existing requirements of disclosure in connection with pension plans, did not mention the securities laws.

pretation provides any basis for extending the coverage of the securities laws to noncontributory pension plans. The question before the Court, therefore, is whether there are policy considerations so strong as nevertheless to require such an extension.

## II.

### Extension of the securities laws to regulate pension plans would not be in the public interest.

The Court is being asked to read the words "investment contract" to include an employee's right to a pension and to read the word "sale" to include the process of working for a living, solely on the ground that it is necessary to do so in order that the policy of the securities laws be furthered.

This Court has often recognized that a remedial statute, however broadly framed, should not be applied to regulate every kind of conduct that might conceivably be read into its terms. Unless it is clearly necessary to further the policy embodied in the statute, such a law will not be extended to cover acts outside the ordinary sense of the words used. See, e.g., *United Housing Foundation v. Forman*, 421 U.S. 837 (1975). Such an extension of the law is not only undesirable but unnecessary in this case.

The decision below makes applicable to pension plans as if they were issuers of stocks or bonds, and to employers as if they were underwriters, the requirements of the "antifraud" provisions of the securities laws, which make it unlawful to use fraudulent schemes or false representations in selling securities. Although the Court of Appeals attempts to minimize these requirements,<sup>27</sup> they

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<sup>27</sup> *Daniel* at 1250.

would in fact subject employers and trustees to a complex disclosure burden which would almost certainly damage the country's private pension system, when superimposed upon the already massive information and reporting requirements of ERISA.

ERISA, designed as a comprehensive disclosure statute,<sup>28</sup> compels the dissemination to employees of all pertinent information about employee benefit plans and provides sanctions to ensure compliance.<sup>29</sup> While ERISA was supported by the American Bankers Association as constructive legislation, one of its less salutary results has been a heavily increased burden of paperwork and governmental regulation. This burden has been onerous enough, and costly enough, to bring about the abandonment or curtailment of many pension plans.<sup>30</sup> As demonstrated by this experience under ERISA, the addition of another layer of regulation would further encourage the

<sup>28</sup> ERISA also was intended to set minimum standards for the operation and funding of pension plans, to establish standards of conduct for plan fiduciaries and to guarantee the payment of benefits. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 7-8, 11 (1973).

<sup>29</sup> ERISA § 2(b), 29 U.S.C. § 1001(b) (Supp. V 1975).

<sup>30</sup> A recent study by the General Accounting Office covering 595 employers that reported termination of pension plans during the period from September 1974 to June 1976 concluded that ERISA was a major factor in 53% of the terminations. Increased costs and the administrative burden of meeting ERISA's reporting and disclosure requirements were among the most significant aspects of ERISA leading to such terminations. Comptroller General, Report to the Congress of the United States, Effect of the Employee Retirement Income Security Act on the Termination of Single Employer Defined Benefit Pension Plans 9-15 (HRD-78-90, April 27, 1978). Another government survey of 1,661 small businesses that reported termination of pension plans from June 1976 through April 1977 showed that ERISA had a substantial effect on the decision to terminate in more than two out of three cases. Staff of House Comm. on Small Business, 95th Cong., 1st Sess., ERISA Questionnaire Results (Comm. Print 1977). See also Bankers Trust Company, ERISA Related Changes in Corporate Pension Plans 1 (1976).

elimination of benefit improvements and the abandonment of private pension plans.

The Court of Appeals hypothesized that "the anti-fraud provisions do not establish an affirmative disclosure system requiring the filing of documents"<sup>31</sup> and optimistically predicted that "[t]here should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage. . . ."<sup>32</sup> However, the holding below is specifically premised on the finding that the antifraud provisions require disclosure of information that differs in both form and substance from what the Court termed the "plethora of information"<sup>33</sup> required to be disclosed under ERISA. The effect of the Court of Appeals' decision is to impose on pension plan administrators and fiduciaries, retroactively, a standard of conduct which is both new and ill-contrived to give employees the kind of protection they really need.

If, as the Court of Appeals held (wrongly in our opinion), a pension plan is really an investment contract which "resembles a mutual fund",<sup>34</sup> it may be anticipated that compliance by pension plans with the securities laws would involve the dissemination to potential plan participants of the kind of information that must be given to prospective investors in mutual funds. What this would entail, in the view of the Securities and Exchange Commission, may be deduced from the disclosure requirements the Commission prescribes in its prospectus rules for mutual funds. The required information would include, among other things, full details about the investment policies of the pension plan; specific information about the

<sup>31</sup> *Daniel* at 1247.

<sup>32</sup> *Daniel* at 1250.

<sup>33</sup> *Daniel* at 1248.

<sup>34</sup> *Daniel* at 1236.

trustee's power and intention to borrow or lend money, or to invest in real estate or in other specialized forms of investment; a disclosure of the present or proposed concentration of investments in particular industries or geographic areas; the percentage of assets that may be invested in the securities of any one issuer, and the percentage that may be invested in each type of security proposed to be acquired; the rate of portfolio turnover; and a description of any legal proceedings to which the plan is a party.<sup>35</sup>

As these policies and facts changed from time to time, updated information would have to be given to all those who had received the prior distribution. Silence in the face of change could be held misleading.

The Court of Appeals indicated, moreover, that in the case of a pension plan the antifraud provisions of the securities laws would require more than the dissemination of "investor" information of this kind. The Court said each prospective participant in a pension plan would have to be told "the actuarial probability . . . that a member actually will receive pension benefits"<sup>36</sup>—that is, the odds on his getting a pension, taking into account the probability of his living long enough, and the probability of his working long and continuously enough, to qualify for a pension—as well as the "risk of loss" and the possibility that the plan will be terminated before the time for

<sup>35</sup> See Securities and Exchange Commission Form S-5, Item 1(a), 17 C.F.R. § 239.15 (1977), and Form N-8B-1, Items 4, 5 and 9, 17 C.F.R. § 274.11 (1977). A mutual fund relies on a single investment manager. It is not uncommon for a pension plan of a large corporation to employ half a dozen. Their diverse investment policies would all presumably have to be described under the decision of the Court of Appeals.

<sup>36</sup> *Daniel* at 1229.

payment comes.<sup>37</sup> As a practical matter, meaningful actuarial information could not be provided for each individual employee, since actuarial probabilities are based upon statistical assumptions about group mortality, average rates of personnel turnover, projected salary levels and estimated future interest rates. Generalized information about actuarial assumptions could be given, but it would necessarily consist of a mass of data and formulae, comprehensible only to actuaries, which could not realistically be related to any particular employee's case.

The kind of information the securities laws would require plan sponsors and administrators to give to employees contrasts sharply with the kind of information Congress thought appropriate when it actually turned its attention to that question in formulating the reporting and disclosure provisions of ERISA. ERISA, which was specifically designed to afford employees all relevant information about pension plans in which they may participate, requires that employees be individually informed in great detail about such matters as how an employee may qualify to participate in the plan; when he will become eligible for benefits; how benefits are determined; what events may lead to loss of benefits; and how he may enforce his rights if benefits are denied. Congress also recognized the importance of disclosing the actuarial and investment policies and practices of pension plans, but instead of compelling plan administrators to distribute these technical data to each prospective participant, ERISA calls for their submission in periodic reports to the Government. All such information is, of course,

<sup>37</sup> Though the Court of Appeals did not mention it, the availability and extent of pension insurance under ERISA in the event of plan termination also would have to be considered in cases arising after the effective date of that Act. See ERISA §§ 4001-68, 29 U.S.C. §§ 1301-68 (Supp. V 1975).

available to employees and other interested parties. This approach obviously reflects a congressional judgment that information of the sort deemed important to investors in mutual funds has little relevance or utility for prospective participants in pension plans.

These examples of differences between the kind of useful plan information ERISA requires to be given to employees and the kind of information that is appropriate for investors give only a hint of the difficulties engendered by the decision below. The Court of Appeals did not attempt to catalogue all of the additional disclosure requirements imposed by the antifraud provisions. Instead, the burden and risk of anticipating such requirements has been placed squarely upon those responsible for employee benefit plans.

The difficulty of compliance with the requirements of the securities laws is compounded by the Court of Appeals' findings that the "primary distribution" of interests in a pension plan takes place when the plan is first established,<sup>38</sup> and that an employee makes a "further acquisition of interests in the pension fund" not only each time he "decides to retain his job",<sup>39</sup> but also each time he performs services that result in payments into the fund and each time union members vote to accept or ratify collective bargaining agreements affecting the pension plan. Almost unbelievably, the decision of the Court of Appeals would require advance distribution to *prospective* employees of all material facts that might affect the amount and the ultimate payment of pensions they could qualify for as retired employees. And under familiar securities law concepts the documents setting forth this information

<sup>38</sup> *Daniel* at 1246 n. 46.

<sup>39</sup> *Daniel* at 1243.

would have to be updated and distributed repeatedly. The additional burden of these requirements is obvious.

It is easy to say that disclosure can only be helpful, and the more information the better. But this takes no account of the cost, in time and money, of the disclosure process, in relation to the value of the information to those who receive it. Unquestionably the additional work by executives, lawyers, actuaries and accountants that would be required for compliance with the securities laws as interpreted by the Court of Appeals would dramatically increase the already burdensome administrative expenses of maintaining pension plans.<sup>40</sup> Pension plan management fees also would have to be raised to cover the additional responsibilities and administrative burdens placed on fiduciaries; the increased costs could not be absorbed by banks without a substantial increase in their fees.

The Court of Appeals believed most pension plans would find compliance with the securities laws no great burden<sup>41</sup> because interests in trusts "maintained" by banks under corporate pension plans are specifically exempted from the *registration* requirements of the Securities Act of 1933,<sup>42</sup> and many pension plans use banks as trustees. Banks themselves are far less sanguine. As a

<sup>40</sup> There are indications that Congress now recognizes the disproportion of even the ERISA compliance burden. Following hearings, a bill has been introduced that would cut back the present reporting and information requirements. S. 3017, 95th Cong., 2d Sess., 124 Cong. Rec. S 6589 (daily ed. May 1, 1978). One of the cosponsors of this legislation has stated that the purpose of the proposed changes in the reporting and disclosure provisions of ERISA is "to avoid disruptive and costly duplications of professional services and to further reduce paperwork burdens." 124 Cong. Rec. S 6582 (daily ed. May 1, 1978) (remarks of Sen. Williams).

<sup>41</sup> *Daniel* at 1250.

<sup>42</sup> Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2) (1976). Under the Court of Appeals' decision, plans served by trustees other than banks would presumably be subject to the 1933 Act's registration requirements as well as its antifraud provisions.

practical matter, a prudent plan administrator seeking to assure compliance with the antifraud provisions of the securities laws would have to provide potential plan participants with the equivalent of a 1933 Act prospectus, even though a formal registration statement might not be required. To do less, or to make no written record of the information provided, would be to risk liability for damages in an action under the antifraud provisions.

Another serious consequence of the decision of the Court of Appeals is the open-ended risk created by retroactive application of the securities laws to pension plans whose sponsors and fund managers never imagined that they might be subject to those laws. Although the Court of Appeals did not specifically address the measure of the plaintiff's damages, the plaintiff seeks payment of the entire amount of the pension benefit to which he claims to be entitled. Thus, in addition to potential liability for damages caused by attempted compliance that may be found deficient in the future, pension plans now face the prospect of innumerable claims for benefits by ex-employees who are no longer covered by the plans but who complain that they were not given adequate investor information.<sup>43</sup>

It is clear that bank fiduciaries will not be willing to bear the risk of such liabilities unless provision can be made for insurance or adequate reserves, either of which would of course increase the charges against pension plans. But it is unlikely that insurance will be available; private insurance carriers have so far proven unwilling to

<sup>43</sup> Cf. *City of Los Angeles, Department of Water and Power v. Manhart*, 46 U.S.L.W. 4347, 4352-53 (April 25, 1978), holding that retroactive liability should not be imposed to redress the effect of a requirement, held to be illegal, that women employees make larger contributions to a pension plan than men. The Court said that "[r]etroactive liability could be devastating for a pension fund." *Id.* at 4347 (footnote omitted).

cover the risks of fiduciary liability under ERISA at any reasonable cost.

The increased burden, cost and risk of administering pension plans if they are held subject to the antifraud provisions of the securities laws will inevitably contribute to the abandonment of many plans and the curtailment of benefits under others, especially those of small and middle-sized companies. The ultimate effect will be to harm the very employees whom the Court of Appeals purports to protect as it strains to provide relief under the securities laws in this case.

### III.

**Extension of the securities laws to pension plans is not necessary to provide relief to the plaintiff or other employees "defrauded" by forfeiture clauses or by inadequate disclosure statements by plan administrators.**

#### A. ERISA now provides full protection against loss of pension benefits through harsh forfeiture provisions or through inadequate disclosure.

The "fraudulent" conduct alleged by the plaintiff to have resulted in his loss of a pension occurred before the enactment of ERISA. If ERISA had been in effect at the time, the plaintiff would have received his full pension; it would have been illegal for his union's plan to have included the harsh forfeiture rules that caused his loss of benefits.

ERISA requires all pension plans to conform to specified vesting rules, which would assure a worker like the plaintiff, who had reached the age of 63 and had completed over 22 years of service, a 100% nonforfeitable

interest in his pension, notwithstanding his four-month layoff. Under the rules of ERISA, his pension rights could not have been cut off by even a much longer break in service, for any reason.<sup>44</sup>

Moreover, if ERISA had been in effect at the time of the events giving rise to this case, a failure by the plan's administrators to have explicitly informed the plaintiff in writing, upon becoming a plan member, of any circumstances that could result in his loss of benefits would have been a violation of ERISA that could be remedied at the hands of either the plaintiff or the Department of Labor (among others) without regard to whether the plaintiff or anyone else had suffered, or might suffer, any actual loss as a result of such a failure of disclosure.<sup>45</sup>

In short, this case is an anachronism. It could no longer happen. This Court should not allow the unprecedented and disruptive decision of the Court of Appeals to stand merely to afford relief to the plaintiff or to others with pension plan grievances antedating ERISA. They will find adequate remedies for any significant wrongs done them, without resort to the securities laws.

**B. The plaintiff can obtain full redress without resort to the securities laws.**

The way in which this case has developed has obscured the fact that the plaintiff has other causes of action available that could give him full redress. The defendants have appealed only from that portion of the

<sup>44</sup> ERISA § 203, 29 U.S.C. § 1053 (Supp. V 1975).

<sup>45</sup> ERISA §§ 102, 104, 502, 29 U.S.C. §§ 1022, 1024, 1132 (Supp. V 1975). See 29 C.F.R. § 2520.102-3 (Contents of summary plan description) and § 2520.104b-2 (Summary plan description) (1977).

district court's order which denied their motion to dismiss the plaintiff's counts under the securities laws. Four other counts included in the complaint were upheld against the motion to dismiss and are not subject to interlocutory review. If this Court reverses the decision of the Court of Appeals and dismisses the plaintiff's claim for relief under the securities laws, and if the case is then tried on the remaining counts, there is little doubt the plaintiff could prevail by establishing the facts pleaded in his complaint, and that if he does so he can obtain the redress he seeks—complete restoration of his pension.

The complaint alleges—in addition to the causes of action based on the securities laws—that the “break-in-service” rule of the union's pension plan, as applied to his involuntary layoff of less than four months, arbitrarily denied him pension benefits and that the defendants misled him concerning the existence of this rule. Complaint, Counts IV and V, 42a-47a. Both claims afford a basis for relief under existing case law.

**1. Pension eligibility rules which result in forfeiture of benefits on the basis of a brief, involuntary break in service are not enforceable.**

Relying on the explicitly fiduciary character of pension trusts, which requires pension plans to be administered exclusively in the interest of employees, courts have frequently acted to set aside pension eligibility requirements which are “arbitrary and capricious” in denying benefits, or which are not reasonably related to the function of the pension plan. See, e.g., *Connell v. United States Steel Corp.*, 516 F.2d 401, 407 & n.8 (5th Cir. 1975); *Roark v. Boyle*, 439 F.2d 497, 500-04 (D.C. Cir. 1970).

The courts have specifically struck down eligibility requirements like those imposed on the plaintiff here, which operate to penalize an employee because of a break in service which is beyond his control. In *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972), the court refused to apply a break-in-service rule against a plaintiff who, after completing the minimum service requirement but before reaching retirement age, had an involuntary service break which disqualified him for a pension.

"We think that the rule [of the pension plan], to the extent that it prohibits benefits to an employee solely because of an involuntary interruption in employment after the completion of his minimum employment requirement and before reaching retirement age, is unreasonable on its face." *Id.* at 1312.

In reaching its conclusion, the *Lee* court specifically noted that pension plans "generally differentiate between voluntary and involuntary breaks in employment insofar as the effects on accumulated credits for prior services are concerned. When the break is due to lack of jobs, credits are preserved; but they are lost when the employee quits." *Id.* at 1312 n.3.

In *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977), the court followed *Lee*, holding that it was fundamentally unfair to apply a break-in-employment rule retroactively and without notice to destroy fifteen years of service credit. In *Insley v. Joyce*, 330 F. Supp. 1228 (N.D. Ill. 1971), the district court upheld a complaint challenging a break-in-service provision of the Teamsters Local 710 Pension Plan, which deprived employees of any credit for employment prior to a break of more than three years—far longer than the brief period for which the plaintiff here was unemployed—saying such a rule might

be found to violate the requirement that a pension plan be for the sole and exclusive benefit of employees. *Id.* at 1233.

Similar in principle are cases holding that a "signatory last employment" rule (requiring an employee to have worked in a covered bargaining unit for a specified period immediately before retirement) should not be given effect when the employee is unable to satisfy the rule because work is unavailable. *E.g.*, *Teston v. Carey*, 464 F.2d 765 (D.C. Cir. 1972); *DePaoli v. Boyle*, 447 F.2d 334 (D.C. Cir. 1971). The courts also look with disfavor on forfeiture provisions, such as that involved here, under which one person can obtain a pension by working in covered employment a shorter period than another person who is denied benefits. *See Roark v. Boyle*, 439 F.2d 497, 507 (D.C. Cir. 1970). As the court observed in *Lee v. Nesbitt*, 453 F.2d 1309, 1312 n.3 (9th Cir. 1972), and as the Court of Appeals itself said in the opinion below,<sup>46</sup> it is uncommon for a pension plan to penalize an employee by destroying past service credit when a break in service is occasioned by circumstances beyond the employee's control.

Strong support for the plaintiff's common law counts is also found in a case recently decided by the New York Court of Appeals. *Mitzner v. Jarcho*, 44 N.Y.2d 39, 403 N.Y.S.2d 490, 374 N.E.2d 388 (1978). Mitzner's situation was remarkably like that of the plaintiff here. Mitzner had worked in the plumbing trade from 1922 until 1968, joining the union upon its organization in 1939.

<sup>46</sup> "A survey of 32 pension plans representing over half of the Teamster membership disclosed no other plan which would have absolutely disqualified a man in Daniel's circumstances. Most plans have continuity requirements but involuntary breaks in service are usually remediable upon satisfaction of certain requirements." *Daniel* at 1226 n.1.

A union pension plan was instituted in 1952. Eligibility for benefits was premised on (among other requirements) 1250 days of employment at the plumbing trade, including some employment with a contributing employer during each of the two years preceding the application for retirement. There was originally no other service requirement, but in 1966 the plan was amended to add a requirement of fifteen consecutive years of employment with a contributing employer immediately before application for benefits. Mitzner would have met this new requirement but for a one-year break in 1961, during which he was employed as an officer of a plumbing company in which he owned stock.

In 1966, Mitzner applied for early retirement benefits on the basis of a physical disability, but he was told by the plan trustees that he had not met the 1250-day requirement. He thereupon continued to work through 1968, when he satisfied the 1250-day rule and renewed his prior application for benefits. This time the trustees denied his application on the ground that he had not met the fifteen-year service rule because of his 1961 break in service. He had not previously been informed of the fifteen-year service requirement.

The New York Court of Appeals held that the continuous service requirement, though not inherently unlawful, had been arbitrarily applied in Mitzner's case to deny him a pension to which he was entitled. The court pointed to the retroactive application of the service rule and to the trustees' failure to notify Mitzner of that rule as exacerbating its basic unfairness, but the underlying ground of the court's decision was the operation of the plan to strip 21 years of service credits from a worker who "was clearly an intended beneficiary of the trust fund." 44 N.Y.2d at 46, 403 N.Y.S.2d at 494, 374 N.E.2d at 391.

The treatment of the plaintiff here obviously violates the principles laid down by both federal and state courts in the decisions described above. If the allegations of the complaint are true, the plaintiff should be able to establish that it was arbitrary for a plan intended to provide retirement income for long-service employees to deny him the accumulated benefits of 22 years of service on account of an involuntary four-month absence from work. It is not necessary for the courts to stretch the federal securities laws to provide relief against such a result.

## **2. Employees have remedies against shortcomings in disclosure of pension eligibility requirements.**

The plaintiff alleges that the defendants misled him about the existence of the rigid break-in-service rule of his pension plan. If this is true, he has an adequate remedy without resort to the securities laws and even though he is not covered by ERISA. The courts will not permit application of a break-in-service rule to an employee who but for a break would have qualified for a pension but who was not told about the rule by the plan administrators. *Burroughs v. Board of Trustees*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Kosty v. Lewis*, 319 F.2d 744, 748-49 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). In *Burroughs* the court said "it was fundamentally unfair for the Trustees to apply the break-in-employment rule to employees such as Burroughs who had no notice of its existence and hence no reasonable opportunity to protect themselves from its impact. . . ." 542 F.2d at 1131. That reasoning applies equally here. The plaintiff alleges he would have sought employment elsewhere if he had been informed of the break-in-service rule.<sup>47</sup>

<sup>47</sup> *Daniel* at 1227.

In *Mitzner v. Jarcho*, 44 N.Y.2d 39, 403 N.Y.S. 2d 490, 374 N.E. 2d 388 (1978) (discussed above at pp. 29-30), the New York Court of Appeals likewise condemned the trustees' failure to inform the plaintiff of the break-in-service rule relied on by the trustees to disqualify him. This holding was in accord with the prior state law, under which it was clear that an employee had a common law remedy against a plan sponsor who misled him about his pension rights. In *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537 (2d Cir. 1962) the court, applying state law, established a strict standard of disclosure. The plaintiffs' decedent, who had been an employee of Anheuser Busch, wrote to the company to inquire about his retirement benefits. The company responded with a memorandum from its pension consultants that was literally accurate but which, the court held, was sufficiently (though unintentionally) misleading to warrant a recovery by the plaintiffs. As Judge Friendly wrote:

"The failure of communication was that, although the memorandum warned Barsi [the employee] that, in choosing the lump sum, he would be taking a risk of some diminution in the event of death prior to May 1, 1958, it did not do this adequately. 'Would not be as much as' is not an apt description of the relationship of \$32,780.44 to \$79,690—in the language of the Restatement [of Torts § 552], the pension consultants did not 'exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting.' " 299 F.2d at 545.

The decision in *Gediman* was predicated on a relationship between the parties (the employee on the one hand, and the employer and its pension consultants on the

other) sufficient to justify an expectation of clear and accurate communication. *Id.* at 544. Plainly, the relationship between the plaintiff and the defendants in the instant case similarly implied a duty of complete disclosure, and the allegation that the defendants made "[m]isleading statements as to the continuity requirement of the vesting provision for the payment of a benefit" (Complaint ¶ 17(A)(2), 32a) makes out the same cause of action for "false representations either knowingly or carelessly made" that was upheld in *Gediman*. 299 F.2d at 541. In fact, it may be easier for the plaintiff to prove his case under the *Gediman* standard than to meet the requirements for recovery under the antifraud provisions, which probably include scienter, the "intent to deceive, manipulate, or defraud." See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (footnote omitted).

Accordingly, if the plaintiff can prove the misrepresentations alleged in his complaint, he should prevail without resort to the federal securities laws.

## CONCLUSION

In granting the plaintiff a cause of action under the securities laws, the Court of Appeals has unnecessarily extended the reach of those laws to pension plans generally. Adequately protected by other causes of action, the plaintiff and others in his position have no need for new rights under the securities laws. On the other hand, the Court of Appeals' decision would place on all pension plans, their sponsors and fiduciaries a costly and cumbersome burden of compliance with the vague and inappropriate disclosure requirements of the securities laws. In return, the participants in those plans would obtain nothing of value beyond what is already provided by ERISA.

It is respectfully urged, on behalf of professional fiduciaries, that this Court reverse the decision of the Court of Appeals.

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Respectfully submitted,

WILLIAM H. SMITH

*General Counsel*

American Bankers Association  
1120 Connecticut Avenue, N.W.  
Washington, D.C. 20036

*Of Counsel:*

D. BRET CARLSON

PAUL E. KONNEY

STEPHEN R. KROLL

ROGER P. JOSEPH

DEBEVOISE, PLIMPTON, LYONS & GATES  
299 Park Avenue  
New York, New York 10017